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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001888-MR

TROY WADE — APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 12-CR-00030

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT, AND SMALLWOOD,[1] JUDGES.

LAMBERT, D., JUDGE: Troy Wade, acting *pro se*, brings this appeal of an order of the Meade Circuit Court, which summarily denied his motion for post-conviction relief pursuant to both Rule 60.02 of the Kentucky Rules of Civil

[1] Judge Gene Smallwood concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

Procedure ("CR") and Rule 11.42 of the Kentucky Rules of Criminal Procedure ("RCr"). In this appeal, Wade asserts a litany of alleged errors by his counsel, both at trial and in his direct appeal, which he contends operated to his detriment. Having reviewed the record, we find no basis for reversing the trial court's ruling and accordingly affirm.

I. FACTUAL AND PROCEDURAL HISTORY

On May 13, 2013, a jury convicted Wade of first-degree trafficking in a controlled substance, tampering with physical evidence, and being a first-degree persistent felony offender ("PFO"). He received a twenty-year sentence and is currently serving it in the custody of the Kentucky Department of Corrections. He appealed his conviction, which the Kentucky Supreme Court affirmed. We will borrow the Supreme Court's succinct general recitation of the facts of Wade's case:

> According to the evidence presented at trial, John Fuquay was facing drug trafficking charges when he agreed to act as a confidential informant, assisting Detective Bart Ponder of the Meade County Sheriff's Office by making drug buys from other suspected drug traffickers. To that end, Fuquay arranged to meet Appellant at a place called "The Tree House" to purchase $100.00 worth of cocaine using a one-hundred dollar bill that Detective Ponder had marked with two circles drawn on the back.
>
> After meeting with Appellant, Fuquay returned to Ponder with a quantity of cocaine that he allegedly purchased from Appellant, and without the $100 bill. Appellant was not immediately apprehended, and when he was

> found later and searched, he did not have the marked $100 bill.
>
> Acting upon a tip the next morning, Ponder interviewed a woman who had been present at the Tree House the previous evening when Appellant was there. She told Ponder, and later testified at trial, that Appellant had asked her to take a $100 bill to a nearby store, buy him some cigarettes, and bring him back the change. Ponder then went to the store, and with the owner's assistance, he examined the $100 bills collected the prior evening and found the marked bill.

Wade v. Commonwealth, 2013-SC-000410-MR, 2014 WL 7238402, *1 (Ky. Dec. 18, 2014).

On May 15, 2015, Wade filed a *pro se* CR 60.02 motion, which asserted claims of ineffective assistance of both trial and appellate counsel. Appointed post-conviction counsel filed a supplemental motion on January 27, 2016, and was permitted to withdraw thereafter. Wade later filed two *pro se* supplements, on February 2, 2016 and August 10, 2016.

The trial court issued an order on October 3, 2016 summarily denying Wade's motion. Within that order, the trial court noted both that defense counsel had filed motions *in limine* regarding several of the errors and that Wade's own *pro se* pleadings placed him in the vehicle in which the drug transaction took place. The trial court held that Wade's allegations were outside the scope of RCr 11.42, either as matters reserved for direct appeal or they fell within the realm of trial strategy.

This appeal followed, wherein Wade renews his arguments rejected by the trial court, that his trial counsel committed multiple errors as did his counsel in the direct appeal. We will address each below and supply any additional facts necessary to do so.

II. ANALYSIS

A. STANDARD OF REVIEW

The seminal case concerning claims of ineffective assistance of counsel is *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* set the standard of review in such cases which Kentucky courts adopted in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). This test begins with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. The test requires a two-pronged analysis, with the first prong being whether counsel's assistance "fell below an objective standard of reasonableness." *Id.* at 687-88, 104 S.Ct. at 2064. The second prong requires court to determine whether the defendant has affirmatively proven prejudice, defined as a reasonable probability that counsel's deficient performance negatively affected the outcome of the proceedings. *Id.* at 693-94, 104 S.Ct. at 2068.

The rule itself also contains several requirements which mandate strict adherence. RCr 11.42. Among those is a requirement that allegations be stated

with specificity, providing the grounds upon which the sentence is being challenged and the facts on which the defendant relies to support those allegations. The rule is not to be used to relitigate appellate issues or to assert errors not attributable to the performance of counsel.

While *pro se* defendants normally receive more leeway than an attorney under *Commonwealth v. Miller*, 416 S.W.2d 358 (Ky. 1967), subsequent courts have ruled that this leeway does not extended to a failure to comply with the rule's basic requirements.

> Although we recognized in [*Miller*] that more liberal standards apply as to convicts proceeding pro se… we do not retreat from the precept required by the rule itself, in which it is stated:
>
> The motion shall be signed or verified by the movant and shall state *specifically* the grounds on which the sentence is being challenged and the *facts* on which the movant relies . . . .

Brooks v. Commonwealth, 447 S.W.2d 614, 618 (Ky. 1969) (emphasis in original).

Trial courts may dispose of an RCr 11.42 motion without a hearing if the allegations contained therein fail to satisfy either prong. Where the allegations of ineffectiveness fail to create "an issue of fact that cannot be determined on the face of the record[,]" a trial court may deny the motion without the need for further evidence or testimony. *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). Nor do situations where the record adequately shows the lack of prejudice

necessitate a hearing. *Brewster v. Commonwealth*, 723 S.W.2d 863, 865 (Ky. App. 1986).

The Kentucky Supreme Court held in *Hollon v. Commonwealth*, 334 S.W.3d 431, 434 (Ky. 2010), that *Strickland* applies equally to claims of ineffective assistance of counsel on appeal as it does at the trial level. The test, however, is slightly modified for analysis of appellate counsel's performance. Success on a claim of ineffective appellate counsel, premised on a failure to raise a defendant's choice of issue, requires the defendant to overcome the same strong presumption of effectiveness and reasonable strategy, but also to prove that "the omitted issue must be 'clearly stronger' than those presented" to rebut the presumption. *Commonwealth v. Pollini*, 437 S.W.3d 144, 148-49 (Ky. 2014) (quoting *Hollon*, 334 S.W.3d at 436).

B. WADE'S TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE THAT PREJUDICED HIS DEFENSE

Wade asserts multiple allegations of ineffective assistance by his trial counsel. For the sake of simplicity, this Court has grouped similar allegations into categories which permit disposition of several of those allegations under the same analysis.

1. ALLEGATIONS FOR WHICH WADE COULD NOT PROVE PREJUDICE

After reviewing the record, this Court has determined that Wade presented two errors which, even assuming deficient performance of counsel, do not entitle him to relief due to a failed showing of prejudice. The first of these errors is the failure to seek further relief for the Commonwealth's violation of the rule of separation of witnesses. The second is defense counsel's failure to seek relief for Det. Ponder's allegedly perjured testimony.

On the morning of trial, defense counsel moved the trial court in limine to order the separation of witnesses pursuant to KRE.[2] The trial court granted the motion, issuing an oral order consistent therewith. Wade's allegations of error as to this issue stem from the decision by his trial counsel not to move for an evidentiary hearing, a mistrial, or the suppression of the testimony of Dan McCubbin, following a violation of that order.

McCubbin worked as the Chief Deputy of the Meade County Sheriff's Department and as its property room custodian. Dep. McCubbin testified on direct that he released the cocaine Ponder logged in, following the controlled buy operation, to Deputy Allen Wilson for transport to the lab for testing. On the other hand, Det. Ponder had testified earlier in the day that he had transported cocaine to

[2] Kentucky Rules of Evidence.

the lab. The trial court took a brief recess immediately following the Commonwealth's direct examination of Dep. McCubbin, but before the defense had cross-examined him. As the jury exited the courtroom, the trial court admonished Dep. McCubbin, "Don't talk to anybody during the break, officer."

Upon returning to the record following the break, Dep. McCubbin's testimony did not immediately continue. Instead, the trial court directed the parties into chambers. The trial judge noted seeing Dep. McCubbin and Det. Ponder conversing as they returned to the courtroom together, despite his admonition. The Commonwealth admitted to having spoken with Dep. McCubbin during the break, that Det. Ponder was present, and that the Commonwealth had advised Dep. McCubbin that he could speak with the Commonwealth despite the court's admonition. The trial judge asked the Commonwealth about the content of the conversation, to which the Commonwealth replied, "He said on the witness stand that the evidence was delivered by . . . Allen Wilson. We didn't have that information." The trial court declared that Dep. McCubbin was "through testifying about that exhibit." When defense counsel inquired about cross-examination on the subject, the trial court indicated it would be permitted, but cautioned, "if he changes his story, just remember, you left the door open." Upon returning to the courtroom, defense counsel cross-examined Dep. McCubbin, but not about the chain of custody.

Wade raised the issue of contact between the witnesses as prosecutorial misconduct in his direct appeal. The Commonwealth argues that appellate resolution of the prosecutorial misconduct claim precludes Wade from asserting the issue. To support its point, the Commonwealth points to a quotation from *Haight v. Commonwealth*, 41 S.W.3d 436, 442-43 (Ky. 2001): "Many of the claims of Haight have already been raised and disposed of on direct appeal and are not to be heard now under the ruse of ineffective assistance of counsel." The Commonwealth further argues that while *Haight* was overruled by the Supreme Court in *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), such ruling was based on other grounds. This Court's reading of *Leonard*, however, indicates the Supreme Court overruled *Haight* on *exactly* those grounds:

> In *Martin*, this Court recognized the difference between an alleged error and a separate collateral claim of ineffective assistance of counsel related to the alleged error, and held that a claim of the latter may be maintained even after the former has been addressed on direct appeal, so long as they are actually different issues. That holding is confirmed today. To the extent that *Sanborn*, *Baze*, *Haight*, *Sanders*, *Hodge*, *Mills*, and *Simmons* hold otherwise, and thus contradict *Martin*, they are overruled.

Leonard, 279 S.W.3d at 158-159.

The allegation of prosecutorial misconduct represents a trial error, to be sure, but the error asserted in this appeal lies in the lack of response by defense counsel to that alleged misconduct, not the alleged misconduct itself. Thus, the

two appeals pose separate questions, and the prior appeal has no preclusive effect on this claim asserted in the instant one.

Even assuming counsel's failure to seek further relief was a departure from reasonable professional behavior (without so concluding), we must agree with the Commonwealth that the relief Wade received, the limitations imposed on Dep. McCubbin's testimony, constituted the best relief he could have received. Had counsel moved for and received an evidentiary hearing, it would have revealed nothing different about the conversation that had not already been revealed by the Commonwealth—that Det. Ponder, the Commonwealth, and Dep. McCubbin, spoke about the inconsistent testimony. Had counsel moved for a mistrial, success would have been highly unlikely for the same reason a suppression motion would have been unsuccessful, the Commonwealth offered no testimony that had been tainted by the impermissible contact. The Commonwealth had concluded its direct examination of Dep. McCubbin before the conversation occurred. The trial court, in precluding any redirect on this chain-of-custody issue, gave Wade the best relief he could hope for, preventing the Commonwealth from resolving doubts about the legitimacy of the evidence. We cannot conclude any alleged failure by counsel disadvantaged Wade's defense to such a degree that it affected the outcome of his trial.

Wade also claims four interconnected errors which all relate to Wade's characterization of Det. Ponder's grand jury testimony as false. He claims that his trial counsel rendered deficient performance by failing to prove Det. Ponder's testimony was perjured, failing to move to dismiss the indictment as being a product of perjured testimony, failing to move to exclude Det. Ponder's perjured testimony, and failing to move to suppress all evidence connected to Det. Ponder's perjured testimony.

Det. Ponder served as the investigating officer in Wade's case, and as such provided the most crucial testimony before the grand jury. Det. Ponder's grand jury testimony indicated that Wade had been the target of an eight-to-nine-month investigation into drug activity in the Mucker Road area. Det. Ponder testified that he met with Fuquay on January 10, 2012 and provided a marked hundred-dollar bill to make a purchase of cocaine from Wade. Det. Ponder testified that he "observed" Fuquay drive to the end of Mucker Road, where a group of twelve to fifteen people had gathered, exit his own vehicle, and enter Wade's. It was in Wade's vehicle that the transaction took place. This transaction was captured in an audio recording. Fuquay then returned to Det. Ponder without the marked bill, and with the cocaine. According to a recorded statement Det. Ponder took from Nichelle Hutchinson, someone informed Wade that he had just "sold to the police." Wade gave the marked bill to Hutchinson and instructed her

to get change for it at a nearby convenience store. Hutchinson did so and returned with a pack of cigarettes and $96, which she gave to Wade. Det. Ponder testified that he obtained a warrant to search the residence in which Wade was staying, and upon executing the warrant, he did not find the $96 on Wade. Det. Ponder later contacted the owner of the store, Katie Carter, who allowed him to go through the previous night's till, locating the marked bill.

Det. Ponder also testified at trial. Though largely consistent, his trial testimony differed from his grand jury testimony. Det. Ponder's trial testimony indicated that Fuquay had contacted him about doing the controlled buy operation, as opposed to the ambiguous statement that he "met with" Fuquay. Det. Ponder testified that he had personally transported the suspected cocaine to the lab to be tested, which was not included in his grand jury testimony at all. Det. Ponder also testified at trial that he was unable to see Fuquay arrive at the location on Mucker Road or whose car Fuquay entered upon arriving. Finally, though not part of his testimony, Det. Ponder's evidence log also indicated inconsistency: the marked bill was logged into evidence on January 10, 2012, despite his testimony that he did not recover the bill until the morning after the transaction between Wade and Fuquay.

Wade seizes upon each of these inconsistencies to argue that Det. Ponder's grand jury testimony was perjured, and his attorney should have moved

to dismiss the indictment. Again, even assuming this alleged failure by trial counsel to have been ineffective assistance, Wade cannot show prejudice. This Court held in *Commonwealth v. Baker*, 11 S.W.3d 585 (Ky. App. 2000), that trial courts should only exercise their power to dismiss indictments, which we referred to as "'an extreme sanction,'" in "'particularly egregious'" circumstances. *Id.* at 590 (quoting *U.S. v. DiBernardo*, 775 F.2d 1470, 1475 (11th Cir. 1985)). Even in such rare circumstances that would merit the dismissal of the indictment, the remedy would not be a dismissal with prejudice. "A trial court should consider alternative sanctions before imposing the ultimate sanction of dismissal with prejudice[.]" *Id.* at 591.

The *Baker* Court spoke to the example of perjured testimony before a grand jury. "A court may utilize its supervisory power to dismiss an indictment where a prosecutor knowingly or intentionally presents false, misleading or perjured testimony to the grand jury that results in actual prejudice to the defendant." *Id.* at 588. Ultimately, *Baker* affirmed the trial court's dismissal of the indictment, but reversed the portion reflecting the dismissal with prejudice.

Even had Wade shown the Commonwealth knowingly or intentionally elicited perjured testimony, the remedy for such alleged error would be a non-prejudicial dismissal. The Commonwealth could simply present the case to another grand jury, allowing Det. Ponder to give more palatable testimony. Wade

could face trial again, with the Commonwealth's case having been tempered in the forge of his first trial proceedings.

Wade cannot show how these alleged failures of his trial counsel to seek relief affected the outcome of his trial. He has thus failed to prove entitlement to relief based on these allegations.

2. ALLEGATIONS CLEARLY REFUTED BY THE RECORD

Wade asserted a total of six errors against his trial counsel that may be "conclusively proved or disproved, by an examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) (citing *Stanford v. Commonwealth*, 854 S.W.2d 745 (Ky. 1993)).

Wade alleges that his trial counsel rendered ineffective assistance in failing to move to suppress the buy money. However, the video record of the trial shows that defense counsel did in fact move to exclude the buy money, based on an allegedly defectively proven chain-of-custody, at a bench conference during Dep. McCubbin's testimony.

The second of Wade's contentions in this category is that his trial counsel failed to move for a judgment of acquittal. The video record of the trial proceedings reveals that counsel moved for a directed verdict, both at the close of the Commonwealth's case-in-chief and again at the close of all evidence.

The third of Wade's contentions in this category is that his trial counsel rendered ineffective assistance in failing to prove Det. Ponder targeted him. Trial counsel, in fact, elicited testimony that alluded to or supported that assertion.

We will next address Wade's contention that his trial counsel was ineffective in failing to object to the racial composition of the jury pool. The venire consisted of 79 individuals, all of whom were of Caucasian ethnicity. Despite Wade's assertions to the contrary, his trial counsel did assert a challenge to the racial composition of the venire in a bench conference as soon as the jury roll call had been completed.

The next contentions also related to the jury selection process. Wade claims his counsel rendered ineffective assistance in failing to object to two potential jurors who claimed to have attended high school with Fuquay and one whose son did. Defense counsel moved to strike any potential juror for cause who knew Fuquay. Wade also asserts a similar error against his trial counsel relating to a juror who knew Det. Ponder. Defense counsel moved to strike that juror for cause as well. Another potential juror noted in *voir dire* that a relative had died of a drug overdose. Contrary to Wade's assertions, his trial counsel also moved to strike that potential juror.

Wade also argues that his trial counsel rendered ineffective assistance by failing to point out to the trial judge that Wade was not wearing an ankle monitor on January 10, 2012, though he was wearing such a device at the time of trial. On the buy tape, Fuquay is heard asking Wade if a common acquaintance had "got[ten] off the ankle bracelet" yet. This comment was the subject of a pre-trial motion *in limine* by defense counsel. The trial court conducted a hearing on the motion, which sought to redact the portion of the recording containing that comment.

Having compared Wade's allegations to the record of the proceedings before the trial court, it becomes inescapable that each of these allegations were clearly refuted by the record. We cannot conclude the trial court erred in denying Wade's motion based on them.

3. ALLEGATIONS ATTACKING TRIAL STRATEGY

Wade asserts several errors which the trial court concluded were attacks on his trial counsel's strategic decisions. The Kentucky Supreme Court, in stating the need for the presumption of effectiveness, noted that a movant seeking relief "is not guaranteed errorless counsel, or counsel adjudged ineffective [only in] hindsight[.]" *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997). Kentucky courts have expounded on that point:

> On review, as a court far removed from the passion and grit of the courtroom, we must be especially careful not

> to second-guess or condemn in hindsight the decision of defense counsel. A defense attorney must enjoy great discretion in trying a case, especially with regard to trial strategy and tactics . . . . Inasmuch as we might not necessarily agree with trial counsel's trial strategy and may likely have employed other tactics, we do not believe that in light of all of the circumstances his performance was "outside of the wide range of professionally competent assistance."

Harper v. Commonwealth, 978 S.W.2d 311, 317 (Ky. 1998) (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066). Further, "[c]onjecture that a different strategy might have proved beneficial is . . . not sufficient" to rebut the *Strickland* presumption. *Hodge v. Commonwealth*, 116 S.W.3d 463, 470 (Ky. 2003) (*overruled on other grounds by Leonard v. Commonwealth*).

Wade's allegations asked the trial court, as well as this court, to do exactly that. He alleges that his trial counsel rendered ineffective assistance in general, by failing to "plan out the examination of each witness," failure to "know the implications" of the witness order, failure to call character witnesses, failure to call rebuttal witnesses, and failure to conduct "appropriate" redirect examination. He also alleges a failure to question two witnesses, Hutchinson and Carter, to his satisfaction. Finally, Wade alleges his trial counsel rendered ineffective assistance in failing to subpoena Nathan Crouch, whom Wade claims was present in the vehicle during the time the drug buy took place and would deny any such transaction occurred (despite the complete lack of proof to support that assertion).

Given the nature of Wade's allegations, we agree with the trial court in concluding the allegations amounted to an attack on counsel's trial strategy and did not merit an evidentiary hearing.

4. WADE'S ALLEGATION THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE HIS ARREST

Wade alleges that his counsel failed to move to dismiss the indictment against him due to lack of probable cause to arrest him. The evidence available against him at the time of his arrest, Fuquay's statement to Det. Ponder that he had purchased a gram of cocaine from Wade, the cocaine that Fuquay turned over to Det. Ponder after the controlled buy, and the audio recording of the transaction, did provide probable cause to both search the residence in which Wade was staying and to arrest him.

Defense counsel had no basis on which to challenge the arrest. The Kentucky Supreme Court held in *Bowling v. Commonwealth*, 80 S.W.3d 405, 415 (Ky. 2002) that "[i]t is not ineffective assistance of counsel to fail to perform a futile act." Without a basis to challenge the arrest, defense counsel likewise had no basis to challenge the indictment in this context. We must agree with the trial court that this did not amount to ineffective assistance.

5. WADE'S ALLEGATION THAT HIS TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE THE TRIAL JUDGE TO RECUSE

Wade argues that his trial counsel should have moved to have the presiding judge of the trial court recuse himself, and that the failure to do so was ineffective assistance.

KRS 26A.015 states several bases on which a trial judge must disqualify himself, but the only applicable provision here is 26A.015(2)(a), which demands recusal in situations "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding[.]" Proving a valid basis for recusal requires a showing of facts of a "character calculated seriously to impair the judge's impartiality and sway his judgment." *Bissell v. Baumgardner*, 236 S.W.3d 24, 28-29 (Ky. App. 2007) (quoting *Stopher v. Commonwealth*, 57 S.W.3d 787 (Ky. 2001)). Mere belief that a judge might render a biased decision poses insufficient grounds for recusal. *Id.* at 29 (citing *Foster v. Commonwealth*, 348 S.W.2d 759 (Ky. 1961)). Prior evidentiary rulings adverse to one party do not provide a valid basis for that party's motion to recuse. *Id.* ("[T]he trial court's adverse ruling, even if erroneous, does not provide a basis for finding bias.")

Wade argues that the trial judge demonstrated bias during the proceedings. During a hearing on a motion *in limine* to determine the admissibility of portions of the buy tape, the recording was played for the court. After hearing the tape, the trial judge made several comments indicating that one of the voices on the recording was Wade and that the jury could reach a similar conclusion. Wade insists that because the tape did not identify him by name, the conclusion drawn by the trial court is impossible, and indicates a bias in favor of the prosecution.

Had defense counsel made the motion, the likelihood of success is practically zero. "The general rule, as articulated by the Sixth Circuit Court of Appeals, is that '[a] predisposition acquired by a judge during the course of the proceedings will only constitute impermissible bias when it is so extreme as to display clear inability to render fair judgment.'" *Alred v. Commonwealth of Kentucky, Judicial Conduct Comm'n*, 395 S.W.3d 417, 433 (Ky. 2012) (quoting *U.S. v. Howard*, 218 F.3d 556, 566 (6th Cir. 2012)). The trial court's recognition of a voice from a recording played during the proceedings does not reflect a predisposition so extreme as to indicate the judge's impaired impartiality.

Because failing to make a futile motion is not ineffective assistance, we cannot conclude the trial court erred. *Bowling*, *supra.*

C. WADE'S APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE

Wade argues that his counsel on appeal rendered ineffective assistance simply because his appellate counsel asserted different issues than he would have preferred. As noted above, a claim of ineffective appellate counsel requires Wade to prove the issues he wanted to assert on appeal were "clearly stronger" than the issues his appellate counsel actually presented. *Pollini*, 437 S.W.3d at 148-49.

Appellate counsel asserted four errors on Wade's behalf. The first was the trial court's prevention of discussing with the jury venire during *voir dire* the differences between reasonable doubt and clear and convince evidence. The second issue was the introduction of alleged hearsay evidence to bolster Ponder's testimony. The third alleged error was the prosecutorial misconduct allegation stemming from the violation of the separation-of-witnesses order. Finally, appellate counsel argued cumulative error required reversal of the conviction.

In his RCr 11.42 motion, Wade argued that his appellate counsel should have challenged the sufficiency of the evidence to support his conviction. More particularly, he alleges that no evidence existed that: he sold cocaine to Fuquay, Ponder recovered the marked buy money, and he gave the bill to Hutchinson with instructions to get change for it. Wade's argument demonstrates

his misconception that testimony is somehow not evidence. Each of these allegations were refuted by trial testimony, thus evidence does exist on those issues.

That Wade's appellate counsel elected not to present refuted issues of fact does not rise to the level of ineffective assistance. Wade has failed to demonstrate how his chosen issues were clearly stronger than those his appellate counsel did present. For that reason, we cannot conclude he was entitled to either RCr 11.42 relief or an evidentiary hearing.

III. CONCLUSION

Having thoroughly reviewed the record and finding the trial court properly found that neither Wade's trial counsel nor his appellate counsel rendered ineffective and prejudicial assistance, we must affirm the judgment of the Meade Circuit Court denying his motion for post-conviction relief.

ALL CONCUR.

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